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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000931-MR

STACEY L. WIGGINTON

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 11-CR-00206

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
** **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

KRAMER, JUDGE: Stacey L. Wigginton entered a conditional guilty plea to reckless homicide, a Class D felony, for killing her ex-husband, Billy Russell Riley. Stacey was sentenced to serve five years. Pursuant to that plea, she now appeals her judgment of conviction, specifically the Graves Circuit Court's denial of her assertion of immunity from prosecution under Kentucky Revised Statutes (KRS) 503.085. After careful review, we reverse the trial court's denial of immunity.

The record before us does not contain a lot of factual information regarding the surrounding events that lead to the death of Billy Russell Riley. The little we do know is mainly from statements Nancye Riley made to the police the night that Billy was killed. Nancye was immediately questioned by the police upon their arrival after Billy was killed and then a few hours later she was questioned again. The record contains her audio-recorded statements, which we reviewed and will reference in detail *infra*.

By way of background, Nancye Riley is Stacey Wigginton's mother. Stacey resided with Nancye at the time of the events in question. The record indicates that Nancye was also Billy's stepmother, although it is not clear from the record how this came to be. In any regard, Stacey and Billy were married, but divorced in March of 1998, while Billy was serving time in prison for other crimes. On August 7, 2011, Billy was out of prison on shock probation in order to attend an alcohol treatment program. Nancye stated in her report to the police that she had dreaded this weekend, because when Billy would get out on shock probation, the first thing he would do was start drinking. When Billy was intoxicated, he was mean. Both Stacey and Nancye had frequently been the targets of his drunken violence.

Earlier on the night of August 7, 2011, Stacey and Billy had driven Nancye's car to a friend's house. Later, the police came to Nancye's house to drive her to the house where Stacey and Billy were so she could drive them home. Billy had gotten into a fight and needed to be removed from the friend's house.

According to the statement Nancye made to the police, Billy was ranting all the way home, intimidating her and Stacey, calling them names and said “something about Stacey spreading her legs for this [expletive.]” Nancye said that Billy had a “threatening attitude” while in the car and that “he’s scary.” When they finally got home to Nancye’s house, Stacey immediately went to her room, turned out the light, and tried to go to sleep. However, Nancye told the police that Billy followed Stacey into the bedroom, turned on the light, and started cussing at her, yelling at her to “get your fat lazy ass up.” Nancye stated that she went “back and forth” between the living room and Stacey’s room because Billy was “raising his voice” and because Nancye wanted to “make sure he wasn’t hurting her.” Stacey allegedly responded to Billy’s verbal abuse by going into the kitchen, taking a steak knife, and slashing at her arms. Nancye tried to stop her from hurting herself, but she could not. When Stacey was done, she put the knife back in the cabinet, took five to six valium pills, and went back to bed. Nancye got a wash rag to try to stop Stacey’s bleeding, but every time she tried to touch Stacey, Stacey pushed the rag away.

Meanwhile, Billy was calling his friends to see if he could stay the night at someone else’s house. He was getting angrier and angrier because he could not reach anyone. Nancye stated that he complained about being hungry and fried himself two pork chops. Billy sat in a chair next to Stacey’s bed to eat the pork chops; he had a steak knife in his hand. Nancye was watching television

either in the front living room or the kitchen.¹ At some point during the evening, Nancye heard Billy yelling at Stacey. She observed Billy standing beside Stacey, and Stacey was on the ground. Nancye believed that Billy had pushed Stacey to the ground, but she did not actually see this occur. Sometime later, Nancye heard groans from the back of the house. She went back and saw Stacey with a bloody knife in her hand. The officer interviewing Nancye asked if Stacey said anything to her. Nancye replied that Stacey said “I think I got a heart shot there.” After that, Nancye stated that she went to get a telephone in the living room to call 911 because Billy had broken another telephone earlier. Billy died due to the stab wound Stacey inflicted.

The Hayfield Police Department conducted the investigation of the stabbing of Billy. The Uniform Citation from lead officer Det. Mark Watkins included oral statements made by Stacey on the night of the stabbing. She admitted that she had stabbed Billy and that she had taken several Valiums prior to stabbing him. Officer Awberry was the initial responder at Nancye’s home. Upon his arrival, Officer Awberry observed the victim sitting slumped over in a chair with a stab wound to his upper left chest. Stacey appeared to be intoxicated and was lying in a bed next to the chair. Officer Awberry also observed “a large butcher knife on the floor with blood covering the entire blade from the tip to the handle. It appeared that this was the knife that caused the stab wound.” Billy still had the steak knife he had used for eating in his hand. Officer Awberry included in

¹ The record is unclear where Nancye was watching television.

his report other oral statements made by Stacey that night after he arrived at the scene. When asked by Officer Awberry what happened, Stacey stated “I stabbed him, he was calling me a fucking whore and I stabbed him.” After reading *Miranda* rights to Stacey, Officer Awberry again asked her what happened and Stacey stated in response to various questions, “I stabbed him,” “Is he dead?” and “I hope he fucking dies, he deserves to.” Nancye informed Officer Awberry that she did not see the stabbing take place.

Stacey was admitted to the Jackson Purchase Medical Center on August 8, 2011, after the stabbing. The chief complaint listed in the medical record was “alcohol intoxication with drug overdose.” The only other statement in the record attributed to Stacey is a note in the Emergency Service Report that “she also reports that day she had been drinking and ‘we got into it.’” Also noted in hospital records was a chart referencing Stacey’s exterior physical condition. That chart lists a “superficial abrasion” on the left wrist area. After her admission and initial diagnosis, Stacey had to be intubated to protect her airway due to a drug overdose of barbiturates, benzodiazepines, and opiates. She was discharged the following day.

In addition to the information Nancye told the police in her statements cited above, during her two interviews given on the night Stacey killed Billy, Nancye also told the police of numerous threatening statements Billy made and how afraid she and Stacey were of him. Nancye stated to the police that “I’ve been telling people for years that if they ever find her dead, he killed her.” Nancye said

that “he would have killed both of us tonight.” Nancye then stated to the officer that “[Stacey] probably saved both of our lives tonight by doing what she did.” Nancye said of Billy that “he gets mean” and that she was “scared to death of him” but “[didn’t] have to be anymore.” She further stated that Stacey had a cut on her nose where Billy cut her in the past and he set a car on fire with Stacey in it. The officer asked Nancye if Billy had threatened Stacey. Nancye stated “yes,” “he let it be known he was going to kill us both before the night was over.” According to Nancye, this happened before Stacey started cutting herself, which was about 15 minutes prior to the stabbing. Nancye stated “we were both terrified of him.” She said that Billy was “ranting and raving all the way home” during the car ride and that he was “being real intimidating, like he usually was.” Nancye told the officer interviewing her that Billy said “I’ve had it with Stacey. Tonight is the last night you are ever going to see me.” Nancye stated again that Billy “kept on like he always does” and that she was “terrified of him.” Regarding whether Billy had made threats earlier in the evening, Nancye said “Yes, he was going to get us both before it was over with.” Nancye stated that she could not say that she was “hurt that he was gone” and that “he has had us terrified for years.” Nancye again stated that she had said for years that “if they find Stacey dead, he killed her because he was going to.”

In addition to these statements by Nancye, the record contains a long history of domestic violence actions, which occurred when Billy was drinking, as follows:

92-D-0051-001 (Calloway): On October 16, 1992, Billy slapped Stacey.

95-CR-0015: On December 12, 1994, Billy pointed a gun and fired at Stacey three times. While Stacey was on the telephone reporting this to Pine Lake Hospital, hospital personnel reported hearing gunshot. Billy had threatened Stacey if she made a complaint.

99-M-778: On June 22, 1999, Billy grabbed Stacey by the hair and threatened to kill her with a screwdriver he had in his hand.

03-D-0020-001: On March 28, 2003, Nancye received a Domestic Violence Order after Billy got drunk, busted a hole in the wall and threatened to kill everyone in the house. Billy was convicted of violating this order in 03-M-594;03-M-609;03-M-670;03-M1107, and 03-M-1266. 04-M-638: Billy plead guilty to Assault 4th Degree after Stacey called 911 stating “He’s going to kill me.” Stacey had visible injuries.

06-M-530: On April 29, 2006, Billy threatened to shoot Stacey with a shotgun. He pleaded guilty to Terroristic Threatening, 3rd Degree.

06-D-067-001: An Emergency Protection Order was entered based on Stacey’s petition that: “He will probably kill me when he finds me. He has said he would kill me, cut my throat. He has in the past choked me until I was unconscious[.] [H]e has hit me when he has been drinking [and] has held a knife on me before. He told me today he would kill me and my mother. He has shot at me in the past and he probably will try again if he is drinking.”

07-M-805: Billy plead guilty to Assault 4th Degree after he tackled Nancye like a “football player” causing a cut on her forearm and pain in her back and ribs.

On August 26, 2011, Stacey was indicted by the Graves County

Grand Jury and charged with murder for the stabbing death of Billy. She entered a

not guilty plea, and a series of pretrial conferences and hearings followed her arraignment. Stacey was also evaluated at the Kentucky Correctional Psychiatric Center the following year and was found competent to stand trial after a hearing.

On August 23, 2012, Stacey filed a motion to dismiss, asserting immunity from prosecution under KRS 503.085. At a pretrial conference on August 27, 2012, the trial court heard brief arguments from both counsel for Stacey and the Commonwealth with regard to the motion to dismiss. The trial court agreed to review the record and granted defense counsel an opportunity to present case law on whether the court should conduct an evidentiary hearing on the matter.

The parties returned on September 17, 2012, and the trial court heard arguments again from defense counsel highlighting various parts of the discovery filed in the case. Stacey's defense counsel highlighted Nancye's statements and Billy's prior domestic violence convictions as germane to the motion to dismiss. The trial court then asked the Commonwealth for a copy of Nancye's statements to police and stated that it would take the motion "under advisement." The trial court also granted Stacey's motion to admit evidence of Billy's prior domestic violence convictions at trial, if needed.

At the next pretrial conference, the trial court denied Stacey's motion to dismiss and issued a subsequent order detailing such on October 3, 2012. In its order, the trial court stated:

The Court comes away with a very clear picture of the victim as being a dangerous and violent man. He appears

to have been abusive and often engaged in assaulting the Defendant.

On the night of his death, the victim was highly intoxicated and had been engaged with an altercation with a third person. Ms. Riley stated that she was of the opinion that the victim would have killed both she and the Defendant that night. That the victim had grabbed and pushed the Defendant, and Ms. Riley said she saw the Defendant go down. It appears clear that the Defendant is able to present a strong claim of self-defense.

The court, nonetheless, appeared to determine that the threat of harm was not “imminent” and denied the motion to dismiss.

On March 11, 2013, Stacey entered a conditional guilty plea to the amended charge of Reckless Homicide with a recommended sentence of five years. Pursuant to the plea agreement, Stacey reserved the right to appeal the trial court’s denial of her motion to dismiss pursuant to KRS 503.085(1) and (2).

Stacey returned to court on April 16, 2013, for final sentencing. The trial court found that Billy had suffered a serious physical injury and sentenced Stacey in accordance with the Commonwealth’s recommendation of a plea of guilty with five years to serve for Reckless Homicide. This appeal followed.

On appeal, Stacey presents two arguments. First, she argues that the trial court applied the improper standard for determining whether she was justified in using physical force against Billy. Second, she argues that the Commonwealth failed to establish probable cause that her use of force was unlawful. We will address the second issue first, as it is determinative.

Stacey cites to KRS 503.085, which provides in relevant part:

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

KRS 503.085(1) incorporates KRS 503.050, which provides:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

(3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person

against whom the defendant is charged with employing physical force shall be admissible under this section.

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

Stacey relies on KRS 503.050(3) read in tandem with KRS 403.720(1) and KRS 503.010(3) to establish that she was entitled to preemptively defend herself.

An examination of these statutes is instructive as to what was the applicable law to the facts and circumstances surrounding Billy's death. KRS 403.720(1) states in applicable part:

(1) "Domestic violence and abuse" means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple;

KRS 503.010(3) states in applicable part:

(3) "Imminent" means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.

The Commonwealth argues that even in a light most favorable to Stacey, it cannot be argued that she was entitled to presumptively use physical force against the victim on the night of August 7, 2011. The Commonwealth argues that the facts before the trial court as detailed in the discovery, medical records, and statements of Nancye all show that Stacey was not in imminent danger of "death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055." *See* KRS 503.050(2).

The Kentucky Supreme Court has recently elaborated on the parameters of reviewing probable cause in the context of KRS 503.085. *Commonwealth v. Lemons*, 437 S.W.3d 708, 714-15 (Ky. 2014) (citing *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009)). In *Lemons*, the Court wrote that:

In *Rodgers*, we noted that [KRS 503.085] offers little by way of guidance for trial courts regarding how to proceed in evaluating claims of immunity based on self-defense or defense of others. Therefore, we undertook an analysis of the statute to determine what the legislature intended. We concluded that, at each step of the criminal prosecution-defined as arresting, detaining, charging, or prosecuting-there must be “probable cause to conclude that the force used [by the defendant] was not legally justified,” or the case must be dismissed. *Id.* at 754.

We then noted that, although those in the criminal justice system are familiar with the standard of probable cause, “it often eludes definition.” *Id.* However, we also noted that we had recently used the definition provided by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): “[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.” We went on to state that:

Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant’s use of force was unlawful. If such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed.

.....

Having set forth the correct standard of review, we must now determine if the trial court had a substantial basis for denying Lemons's motion to dismiss. "Probable cause has ... been defined as 'reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.'" *Commonwealth v. Jones*, 217 S.W.3d 190, 200 (Ky.2006) [(citing *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990))].

Lemons, 437 S.W.3d at 715.

According to Kentucky Supreme Court case law, the burden was not on Stacey to come forth with evidence to support her claim of immunity under the self-defense statute. Rather, "[t]he burden [was] on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Rodgers*, 285 S.W.3d at 755. In addition to the evidence of record, there is a long line of cases allowing the admission of a victim's other acts of violence, if known to the defendant, when self-defense is claimed. *See Saylor v. Commonwealth*, 144 S.W.3d 812 (Ky. 2004); *Commonwealth v. Higgs*, 59 S.W.3d 886, 892 (Ky. 2001); *Baze v. Commonwealth*, 965 S.W.2d 817, 824–25 (Ky. 1997); *Cessna v. Commonwealth*, 465 S.W.2d 283, 284–85 (Ky. 1971); *Fannon v. Commonwealth*, 295 Ky. 817, 175 S.W.2d 531, 533–34 (1943). Moreover, a justifiable fear leading to the use of deadly force can be based on prior assaults or threats. Cases allowing such evidence have turned on threats made by the victim, *see e.g.*, *Cessna*, 465

S.W.2d at 284–85; or multiple instances of violence, *see e.g., Wilson v. Commonwealth*, 880 S.W.2d 877, 877 (Ky. App. 1994); or a substantial combination of the two, *see e.g., Moorman v. Commonwealth*, 325 S.W.3d 325, 332 (Ky. 2010).

Herein, the trial court was to assess the evidence in the record to determine whether the Commonwealth had met its burden that there was a substantial basis to make a probable cause conclusion that Stacey’s use of deadly force was not legally justifiable. Absent this, *Rodgers* holds that the case should be dismissed.

The Court, having reviewed the record, concludes that the Commonwealth did not meet its burden in this case. First, the record contains the statements Stacey initially made to the police officers who responded to the domestic violence call, which actually add little to resolve this issue. According to the uniform citation in the record, Stacey was very intoxicated at the time they arrived. Billy had been eating a meal; there was a plate on the floor and a steak knife was still in his right hand. Stacey made several statements to the officers, including that she stabbed Billy. Billy had called her a “fucking whore” and “bitch.” She stated to the officer that she “hopes he is dead” and that she “killed him.” Stacey also said “I hope he fucking dies, he deserves to.” And, at the hospital, in her highly intoxicated state, Stacey said that she and Billy “got into it.” There are no other statements attributed to Stacey in reference to what took place in her bedroom, prior to the fatal stabbing. And while her statements were rather

cold and blunt, she probably did hope that the stabbing would be fatal given the abuse she suffered at the hands of Billy. These statements are not sufficient for the Commonwealth to meet its burden of probable cause.

As noted at the outset of this opinion, most of what is known from the night Billy died comes from the statements Nancye made to the police. Among other statements she made to police, Nancye stated that when Billy was drunk, he was mean. Nancye told police that “he let it be known that he was going to kill us both before the night was over”; that “[Stacey] probably saved both of our lives tonight by doing what she did”; that they were “terrified of him”; that “he was going to get us both before it was over with”; and that he was “being real intimidating, like he usually was.” These statements certainly do not support the Commonwealth’s burden of probable cause that the use of deadly force was not justified.

Furthermore, in determining whether the threat of harm was imminent, “[i]t is well settled that a defendant can introduce evidence of particular violent acts of an alleged victim, evidence of threats by the victim, and evidence of hearsay statements about such acts or threats, all of which tends to show the defendant had a justifiable fear of the victim at the time of their encounter....”

Wilson v. Commonwealth, 880 S.W.2d 877, 878 (Ky. App. 1994) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.15 at pg. 70 (3rd ed. 1993); see also, *Cessna v. Commonwealth*, 465 S.W.2d 283 (Ky. 1971); *Fannon v.*

Commonwealth, 295 Ky. 817, 175 S.W.2d 531 (1943); 2 Wigmore, *Evidence* § 248 (Chadbourn rev. 1979)).

Stacey and Nancye had been the victims of domestic violence at the hands of Billy on multiple occasions, spanning well over a decade. Billy's violence against Stacey included a number of threats to kill her, including shooting a gun at her and, according to Nancye, having set a car on fire while Stacey was in it. Nearly each act of domestic violence occurred when Billy was drinking. From the various statements Stacey made in the petitions for domestic violence orders, she frequently said that Billy was going to kill her. Nancye believed that Billy would kill Stacey. Nancye repeatedly stated that she and Stacey were "terrified of him" and in particular to the night of the stabbing, she stated several times that Billy was going to kill Stacey and her "that night" and that Stacey probably saved both of their lives by stabbing Billy. Billy was drinking on the night of the stabbing, as he had during the prior acts of domestic violence. He was highly agitated at Stacey and continued to go in and out of her bedroom. Nancye believed Billy had grabbed Stacey and knocked her to the floor. Billy, who was eating in Stacey's room, was also found with a steak knife in his hand when the police arrived. Given Billy's long history of violence when he was drinking and given the statements Nancye made that she believed that Billy would kill both Stacey and herself that night, the record does not contain evidence sufficient for the Commonwealth to meet its burden of showing that probable cause existed to establish that Stacey was not legally justified in using deadly force. In fact all the

Commonwealth can rely on is the few statements that Stacey made about stabbing Billy and hoping he was dead, which under the facts of this case, does not establish probable cause for the Commonwealth. Consequently, we conclude that there is not substantial evidence in the record for the Commonwealth to meet its burden that there was probable cause that Stacey's use of deadly force was not justified. Accordingly, we reverse.

The foregoing analysis is dispositive of this appeal. Consequently, Stacey's other argument is hereby moot, *i.e.*, that the trial court relied on *Commonwealth v. Bushart*, 337 S.W.3d 666 (Ky. App. 2011) to support its decision to deny her motion to dismiss rather than the standard discussed in *Rodgers* and *Lemons*. Accordingly, we will not discuss it.

For the reasons stated here, we REVERSE the judgment of conviction of the Graves Circuit Court and REMAND for proceedings not inconsistent with this opinion.

ALL CONCUR.

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